

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH.

O.A. No. 843/1989.

Date of decision 21/12/87

Parmesh Chandra

.....Applicant.

Vs.

Union of India & another.

.....Respondents.

CORAM: HON'BLE MR. JUSTICE D.L. MEHTA, VICE CHAIRMAN.
HON'BLE MS. USHA SEN, ADMINISTRATIVE MEMBER.

For the applicant - Mr. R.N. Mathur, advocate.

For the respondents - Mr. U.D. Sharma, advocate.

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(Hon'ble Mr. Justice D.L. MEHTA, Vice Chairman)

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Applicant was selected and recruited in the Indian Administrative Service and was allotted to the Rajasthan Cadre in the year 1973.

2. He submitted the representation to the Govt. for the correction of date of his birth.

According to him, he was borne on 25th September, 1950.

However, in the Matriculation School Certificate, the date has been entered as 1.7.1949. Applicant submitted the certificate of the family register maintained by the Gram Sabha Dheerapur Vikas Khurd Singhpur Janpath Rai Bareilly (U.P.). In this register, it is alleged, that applicant's date of birth has been mentioned as 25.9.1950. Applicant's further case is that he came to know about this entry in 1986 and thereafter he contacted his mother and other family members. All of them gave applicant's date of birth as Bhadwa Sudi 14 Samvat 2007. Thus, the date given in the date of birth register corresponds to Bhadwa Sudi 14 Samvat 2007. Thereafter, he approached the respondents to make the necessary correction in his

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date of birth.

3. Respondent No. 1 rejected his request vide Annexure A/3, dated 20.1.1983. Applicant was informed that under Sub rule (4) of Rule 16-A of All India Services (Death-cum-Retirement Benefits) Rules, 1958, his case cannot be considered. However, the case of the applicant is that this letter was not made available to him immediately and he received this letter at a later stage. Applicant also submitted some affidavits, the entry of the birth register and photostat copy of the horoscope.

4. Respondents filed the reply and submitted that it was not necessary to determine the date of birth afresh as the date of birth of the applicant had already been accepted at the time of his recruitment and it has become final. Before discussing the point of law we would like to state that we are not sitting as a Court of appeal and we cannot enter into the controversy of facts. It is for the respondents to determine whether a particular date of birth is correct date or not and unless we come to the conclusion that the determination of date of birth is in violation of the law or is arbitrary, this Tribunal is not expected to interfere in the matter of correction of the date of birth. The All India Services (Death-cum-Retirement Benefits) Rules, 1958 (hereinafter referred to as 'Rules') were for the second time amended by the Rules of 1971 vide notification dated 4.12.1971 and Rule 16-A and Rule 16-B were inserted. They read as under:-

"16-A. Determination of the date of birth
(1) For the purposes of the determination of the date of superannuation of a member of the service, such date shall be

calculated with reference to the date of his Birth as accepted, or determined by the Central Government under this rule.

(2) In relation to a person appointed after the commencement of All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971;

(a) the Indian Administrative Service under clause (a) or clause (aa) of sub-rule (1) of Rule 4 of the Indian Administrative Service (Recruitment) Rules, 1954; or

(b) the Indian Police Service under clause (a) or clause (aa) of sub-rule (1) of Rule 4 of the Indian Police Service (Recruitment) Rules, 1954; or

(c) the Indian Forest Service under clause (a) or clause (aa) of sub-rule (2) of Rule 4 of the Indian Forest Service (Recruitment) Rules, 1966;

the date of birth as declared by such person in the application for recruitment to the service shall, in the absence of any cogent evidence to the contrary, be accepted by the Central Government as the date of birth of such person.

(3) The date of birth, in relation to a person to whom sub-rule (2) does not apply and who is appointed to the service after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971, shall be determined in the following manner, namely:-

(a) every such member shall, within one month of the date on which he joins the service, make a declaration as to the date of his birth;

(b) on receipt of declaration made under clause (a), the Central Govt. shall, after making such enquiry as it may deem fit with regard to the declaration and after considering such evidence, if any as may be adduced in support of the said declaration, make an order within four months from the date on which such member had joined the service, determining, the date of birth of such member.

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(4)(a) Every member of the service holding office immediately before the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971 shall within three months from such commencement make a declaration as to the date of his birth.

(b) On receipt of a declaration made under clause (a) the Central Government shall, after making such enquiry as it may deem fit with regard to the declaration and after considering such evidence, if any, as may be adduced in support of the said declaration, make an order, within four months from the date of such declaration, determining date of birth of such member.

(5) In the case of a member of the service referred to in sub-rule (3), or sub-rule (4), as the case may be, who fails to make a declaration in respect of the date of his birth as required by such sub-rule, the Central Government shall after taking into account such evidence as may be available to it, and after giving such member a reasonable opportunity of being heard make an order determining the date of birth of such member.

(6) Notwithstanding anything contained in this rule, no date of birth other than the date of birth declared by a member of the service, shall be accepted or determined, in relation to such member except after giving such member a reasonable opportunity of showing cause against the proposed action.

(7) Every date of birth accepted, or determined, under this rule shall be subject to Rule 16-B be final.

16-B. Memorials- The provisions of Rule 25 of the All India Services (Discipline and Appeal) Rules, 1969, shall so far as may be; apply to memorials against an order of the Central Government under Rule 16-A subject to the modification

that for the words 'within a period of three years from the date of passing of such orders' occurring in sub-rule (1) of the said Rule 25 the words 'within a period of three months from the date of order' shall be substituted."

5. Rule 16-A which was inserted by 1971 Rules, was substituted by new Rule 16-A by the Fourth Amendment Rules, 1978. By the said Amendment, Rule 16-B was deleted. The newly inserted Rule 16-A reads as follows:

"16-A. Acceptance of date of birth: (1) For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of his birth as accepted by the central Govt. under this rule.

(2) In relation of a person appointed, after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971.

(a) The Indian Administrative Service under clause (a) or clause (aa) of sub-rule (1) of Rule 4 of the Indian Administrative Service (Recruitment) Rules; or

(b) The Indian Police Service under clause (a) or clause (aa) of sub-rule (1) of Rule 4 of the Indian Police Service (Recruitment) Rules, 1954; or

(c) the Indian Forest Service under clause (a) or clause (aa) of sub-rule (2) of Rule 4 of the Indian Forest Service (Recruitment) Rules, 1966;

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the date of birth as declared by such person in application for recruitment to the service shall be accepted by the Central Government as the date of birth of such person.

(3) In relation to a person to whom sub-rule (2) does not apply, the date of birth as recorded in the service-book or the other similar official document maintained by the concerned Government shall be accepted by the Central Government as the date of birth of such person.

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(4) The date of birth as accepted by the Central Government shall not be subject to any alteration except where it is established that a bonafide clerical mistake has been committed in accepting the date of birth under sub-rule (2) or (3)."

6. For understanding the case of both the parties, it is necessary to have the comparative study of the phraseology used in the said Rules. In the Rules of 1971 after the words, the date of his birth as "accepted or determined" was the phraseology. However, the word "or determined" has been deleted in sub-rule (1) of Rule 16-A by the amendment of 1978. In both the amended Rules of 1971 as well as 1978 the words used are, "by the Central Government under this rule." This distinction is necessary to understand and interpret the Rules as framed. In sub-rule (2) of Rule 16-A, some necessary amendment has also been made. Under the Rules of 1978 (sub-rule (2) of Rule 16-A), the Rule 16-A can be applied in relation to a person appointed, after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971.

7. Admittedly, the applicant was appointed in the year 1973 and he was governed by the Rules of 1971. In sub-rule (2) as amended in 1978 it is provided that, "the date of birth as declared by such person in application for recruitment to the service shall, in the absence of any cogent evidence to the contrary, be accepted by the Central Government as the date of birth of such person." In the rules of 1971 also there was a similar provision that the date of birth declared by such person in application for recruitment to the service shall be accepted by

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the Central Government as the date of birth of such person. However, the provision which was in existence in the year 1971 that, "in the absence of any cogent evidence to the contrary" words have been deleted. Thus under the Rules of 1978, even for the purpose of acceptance, it is not necessary to consider the cogent evidence available for the purpose of acceptance of the date of birth. By this amendment the position which may emerge, according to the Govt. Counsel, is that the foundation for acceptance of the date of birth will only be the application for recruitment to the service and not the type of evidence whether it may be cogent or otherwise to the contrary can be accepted.

8. It will not be out of place here to mention that Rule 16-B which was there in the Rules of 1971 has now been deleted. Under Rule 16-B, there was a provision that the provisions of Rule 25 of the All India Services (Discipline and Appeal) Rules, 1969, shall so far as may be, apply to memorials against an order of the Central Govt. under Rule 16-A subject to the modification that for the words, "within a period of three years from the date of passing of such order" occurring in sub-rule (1) of the said Rule 25 the words, "within a period of three months from the date of order" shall be substituted.

9. The contention of the learned counsel for the applicant is that the Rules of 1971 will apply whereas the contention of the learned counsel for the respondents is that the Rules as amended vide Fourth Amendment of 1978 will apply.

10. Before discussing the citations submitted by the counsel for both the parties, we consider

it necessary to refer the provisions of sub-section 1-A) of Section 3 inserted by the All India Services Amendment Act, 1975 w.e.f. 9.5.1975. Sub-section 1-A of Section 3 reads as under:-

"Power to make rules conferred by this Section shall include the power to give retrospective effect from a date not earlier than the date of the commencement of this Act to the Rules or any of them, but no retrospective effect shall be given to any rule so as to prejudicially affect the interest of any person to whom such rule may be applicable."

11. The case of the counsel for the applicant is that by applying the Fourth Amendment of 1978 retrospectively to a person who was in the employment in the year 1973 and also who was in the employment at the time of coming of this amendment by which Section 1-A has been inserted will adversely/ prejudicially affect the interest of the applicant as the Rules of 1978 cannot be applied against him.

12. The second contention of the learned counsel for the applicant is that the Rules of 1978 are arbitrary in nature and they are violative of Articles 14 and 16 of the Constitution of India. Mr. Sharma appearing on behalf of the respondents has submitted that this matter is squarely covered by the/judgment of the Principal Bench of C.A.T. in the case of V.P. Kapur Vs. Union of India & Another reported in (1994) 27 ATC 383. However, Mr. Mathur appearing on behalf of the applicant submits that the judgment is not applicable and it does not lay down a law that Rule 16-A as amended vide Fourth Amendment is intra-vires.

13. The third limb of the argument of Mr. Mathur is that the principles of natural justice have been violated and the respondents have passed the order without giving him the due opportunity of hearing.

14. The fourth limb of the argument of Mr. Mathur is that no speaking order has been passed by the respondents while rejecting his application for the correction of his date of birth and the points in this petition have not been discussed by the respondents.

15. First of all, we will take into consideration the second contention of the learned counsel for the applicant regarding vires of the rules. In the case of Shri V.P. Kapur Vs. Union of India & Anr. reported in (1994) 27 ATC 383, the Full Bench of the Tribunal has considered this question in Para 8 of the judgment and in Para 9 of the judgment after considering the various decisions of the Hon'ble Supreme Court and other Courts. The Principal Bench of the Tribunal came to the conclusion that it is not possible to accede to the contention that the amended rule is liable to be struck down as offending Articles 14, 16 and 21 of the Constitution. The view taken by the Tribunal in the case of Shri V.P. Kapur (supra) needs no reconsideration and we are in agreement with the view taken by the Full Bench of Principal Bench. We do not find force in the submissions made by Mr. Mathur on this point.

16. Mr. Mathur cited before us the case of Kumari Shrilekha Vidyarthi and others Vs. State of U.P. and others reported in (1991) SCC 212. This

is a case relating to the appointments of Public Prosecutors. In the case of Kumar Shrilekha Vidyarthi the Court was called upon to consider the provisions of Criminal Procedure Code and the U.P. Law Manual. The court came to the conclusion that the Public Prosecutors cannot be changed with the change of the Govt. as they are appointed under statute and their appointment is made after due consultation with the District Judges. This case does not apply, in the facts and circumstances of the instant case, and this case is not of termination of one Public Prosecutor or any officer of the State, replacing him by other person. Apart from this, it is not a case of consultation also. In the instant case the Govt. ^{had no} need ~~not~~ to ^{to} consult judiciary. In the facts and circumstances, we are not in agreement with Mr. Mathur that this case is applicable on all fours.

17. Mr. Mathur in support of his contention has cited before us the case of the Accountant General and another V. S. Doraiswamy and others reported in AIR 1981 SC 783. In this case the question was about the applicability of the rules with retrospective effect. The Hon'ble Supreme Court came to the conclusion that, " It is settled law that unless a statute conferring the powers to make rules provides for making the rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309." The Hon'ble Supreme Court delivered judgment in the case of B.S. Vadera Vs. Union of India & others reported in 1969 SLR SC page 6. In the case of B.S. Vadera the Hon'ble

Supreme Court was of the view that proviso to Article 309 should have retrospective operation., and the power conferred under the proviso to Article 309 was intended to fill hiats i.e. to say tended until the Parliament or the State Legislature enacted law on the subject-matter of Article 309.

18. Mr. Sharma, counsel for the respondents, submitted the case of Roshan Lal Tandon Vs. Union of India and others reported in 1967 SLR (SC) 832. The Hon'ble Supreme Court was of the view that though the origin of relationship is a contract, but it is not like an ordinary contract of service between Master and Servant, but if it is a legal relationship which is entirely different from contractual relationship. The Hon'ble Supreme Court was of the view that it is more of a status than of a contract. ^A The similar view has also been taken by the Hon'ble Supreme Court in the case of Dinesh Chandra Sangma Vs. State of Assam & ors reported in 1978(1) SLR 25. The Hon'ble Supreme Court has reiterated the same view and held that the employment under the Govt. is a matter of status and not of contract though initially started by contract. Their Lordships considered the Fundamental Rule 56.

19. Mr. Sharma has also cited before us the case of Punjab and Haryana High Court reported in 1972 SLR 627 titled Shyamal Kumar Sarkar and others Vs., Union of India and ors. This case is ~~is having~~ ^{are} some relevance. The Hon'ble High Court held that the Central Govt. is entitled under the All India Services Act to frame rules and regulations in accordance with statutory provisions which can only be impeached if they ^{are} ~~any~~ violative ^{of} any Act of Legislature

or Part III or any other provisions of the Constitution. We will like to point out that in this case the provisions of sub-section 1-A of Section 3 of All India Services Act, 1951 have not been considered as this new inserted sub-rule 1-A was not in existence at the time of decision of this case.

20. Mr. Sharma also cited before us the case of Deonath Singh Yadav Vs. State of Uttar Pradesh and others reported in 1991(7) SLR 450 and the case of Government of Andhra Pradesh & anr Vs. M. Hayagreeva Sarma reported in 1990(2) SLR 742. Mr. Sharma also cited the cases of State of Jammu and Kashmir Vs. Triloki Nath Khosa and ors. reported in 1974(1) SLR 536 and Union of India and another Vs. Karam Chand Gauba reported in 1989 (2) SLR (CAT) 379 to show that the employees are governed by the Service Rules framed under Article 309 of the Constitution of India and not under the contract. In the case of Union of India Vs. Harnam Singh reported in 1993(2) SLR (SC) 42, the reasonable period was considered as five years and that period was upheld by the Hon'ble Supreme Court.

21. As far as the proposition of law is concerned, we are of the view that the Govt. servant ^{only} is a holder of status and is not ~~only~~ governed by the contract which was entered into at the time of his initial recruitment. We are also of the view that the Govt. has a power to frame the Rules and to declare that they shall have ~~the~~ retrospective effect. Ordinarily, the rules cannot be framed retrospectively in a way which may be prejudicial to the interest of the Govt. servants.

22. The cases cited by both the parties are not very much relevant in the light of the special provisions which find place in the Act of 1951 particularly sub-section 1-A of Section 3. This section empowers the Govt. to give retrospective effect from a date not earlier than the date of commencement of this Act i.e. 1951 or ~~any other date~~, but no retrospective effect shall be given to any rule as to prejudicially affecting the interests of any person to whom such rule may be applicable. The date of birth is a condition of service and is not an incidence of service. On the basis of a date of birth, an employee has a right to continue in employment ordinarily under the law till he attains superannuation age. Of course, he can be penalized, he can be removed or dismissed after following the due procedure of law. Thus, the date of birth creates a vested right in the employee to continue in employment till he attains the age of superannuation.

23. Now the questions which are very important for the determination are whether the Rules of 1978 are consistent with the provisions of Section 1-A or not. Whether a person employed in 1973 can make a submission that the Rules of 1978 should not be applied to him as they are likely to prejudice his interest with retrospective effect. The second question which needs consideration is about the deletion of the word, "determined" in the amended Rule 16-A. Under Rule 16-A for the purpose of determination of the date of superannuation of the service such date shall be calculated with reference to the date of his birth as accepted or determined. So, the word 'determined' is used

after the word 'accepted'. The next question which needs consideration is about the provision of Rule 16-B relating to Memorials. Under the old Rules of 1971, the provision of Rule 24 or 25 of All India Service (Discipline and Appeals) Rules, 1969 could be applied to the Memorials against an order of the Central Govt. under Rule 16-A subject to the modification that for the words, "within a period of three years from the date of passing of such order" be substituted to "within a period of three months from the date of order." This provision has been deleted also under the Rules of 1978. What is the effect of deletion has not been decided by the State Govt. and has not been discussed. However, Mr. Sharma, appearing on behalf of the UOI was of the view that All India Services (Discipline & Appeal) Rules, 1969 are wide enough and may apply to the Memorial to the President against any order of the Central Govt. The word 'any order' used in Rule 25 should be limited only to the disciplinary proceedings including the appeals or should be given a wider interpretation that the word 'any order' includes any order passed by the Govt. under any rules framed under the Act of 1951.

24. The respondents have not passed also a speaking order. We would not like to pass any order in favour of the applicant except that the respondents should consider all the points raised by the applicant in the O.A. and pass a speaking order. If they are of the view that the amended Rules are prejudicial then they should apply the old rules of 1971. In case they are of the view that the amended Rules are not prejudicial then they will pass a speaking order

giving reasons thereof. With this direction, the
O.A. stands disposed of.

No order as to costs.

'MS'

Usha Sen
(USHA SEN)
ADMINISTRATIVE MEMBER

D.L. Mehta
(D.L. MEHTA)
VICE CHAIRMAN